Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	
	)	
	)	CS Docket No. 97-151
Amendment of the Commissions Rules and Policies Governing Pole Attachments	)	

REPLY COMMENTS OF CHAMPLAIN VALLEY TELECOM INC., WAITSFIELD-FAYSTON TELEPHONE CO., INC., AND WAITSFIELD CABLE TELEVISION, A DIVISION OF WAITSFIELD-FAYSTON TELEPHONE CO., INC.

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TABLE OF CONTENTS

INTRODUCTION

Champlain Valley Telecom, Inc., Waitsfield-Fayston Telephone Co., Inc., and Waitsfield Cable Television, a division of Waitsfield-Fayston Telephone Co., Inc., submit the following comments in response to the comments filed in the Notice of Proposed Rulemaking (NPRM) issued by the Federal Communications Commission in the foregoing Docket No. 97-151:

Specifically, these reply comments are in response to comments filed by:

1. The Edison Electric Institute
   UTC, The Telecommunications Association (EEI and UTC)

2. American Electric Power Service Corporation
   Commonwealth Edison Company
   Duke Energy Corporation
   Florida Power and Light Company

3. Bell Atlantic

4. Adelphia Communications Corporation
   The Arizona Cable Telecommunications Association
   The Pennsylvania Cable and Telecommunications Association
   Suburban Cable TV Co. Inc.

5. The National Cable Television Association

6. AT&T Corporation

FAILURE OF NEGOTIATION AS A BASIS FOR JOINT USE RATES

The Joint Comments of the Edison Electric Institute and UTC, The Telecommunications Association urge the Commission to "abandon its historic reliance on rigid formulaic pole attachment rules" and instead permit negotiation and market forces to establish the terms and conditions of pole attachments.[1] American Electric *et al.* contend that the Commission's authority is limited to circumstances where the parties to pole attachment agreements fail to agree, and contend further that even in such circumstances, the Commission must "exercise restraint in the nature and scope of the actions it takes to bring the parties to an agreement."[2] American Electric *et al.* accuse the Commission's interpretation of § 224(e) of subverting the binding nature of their pole attachment rates and the process they use to arrive at them.[3]

These contentions merely reflect the dominant position enjoyed by the electric industry in joint use negotiations. By an accident of history they control the joint use poles. They therefore also control the rate negotiations and direct the market forces.

1. Historical perspective

History has made the electric utilities the majority pole owners across the country. Joint use was initially conceived to permit local telephone and electric

companies to effect cost savings by sharing a joint pole line. Over time, pole ownership became concentrated in the hands of the electric companies, for two main reasons. (1) Electricity is needed on a construction site before telephone service, so the electric utilities were called first and set and owned the poles. (2) The transmission of electricity is inherently hazardous, so the electric utilities preferred to limit their liability exposure by setting and owning the poles.

Early joint use contracts, therefore, dating back to the early 1930's through the 1960's, were predicated on two pole users. During this period the standard joint pole was a 35-foot pole, the available usable space (less the separation space) was distributed ~3-4 ft to the telephone company and ~4-5 ft to the electric company, and the two pole users shared costs in the ratio of 40%/60%, 45%/55%, or even 50%/50%, with 45%/55% being the most prevalent ratio of cost sharing in these early agreements.

2. Unequal bargaining position of large pole-owning utilities and small ILECs

In its NPRM, the Commission has noted that parties in a pole attachment negotiation do not have equal bargaining positions. In fact, as between a large pole-owning utility and a small non-pole-owning local exchange carrier, the inequality of bargaining position is so extreme as to preclude the possibility of any true "negotiation." Many small incumbent local exchange carriers (ILECs), like Champlain Valley Telecom, are themselves recent entrants into the telecommunications market place. They have acquired their telephone systems

within the past five years, typically through purchase from a large, established telephone utility. They often acquire no or few poles when they purchase a system, and in some cases are even expressly prohibited by the pole-owing electric utility from owning poles. But almost invariably, they inherit with the system an obsolete joint use contract with a 45%/55% distribution of responsibility for pole costs as between the electric company and their predecessor local exchange carrier.

3. Inequitable contract provisions

When joint use contracts are "renegotiated," it is always the electric utility that prepares and presents the replacement agreement. Over time, the electric utilities have amended a number of provisions of these contracts to facilitate their interests. For example, the electric companies have doubled their allocated usable space (over and above the safety separation space) from 4-5 ft to 8-10 ft. To accommodate this increased space requirement, they have increased the height of the standard joint use pole from 35 ft to 40 ft, and in some situations today are introducing a 45-foot standard. Meanwhile, the telephone company space allocation has been reduced, from the 3-4 ft of early joint use to an invariable 2 ft.

At the same time, the electric companies have left untouched the contract provisions that work in their favor, most particularly the cost allocation percentages. These early cost-sharing percentages (i) were based on a 35-foot pole; (ii) were predicated on an attachment space allocation of 3-4 ft for telephone and 4-5 ft for power (over and above the separation space); and (iii) assumed only two pole

users.

Today, with complete disregard for the evolution of pole usage, contracts presented to small ILECs retain the demand that the ILEC pay 45% of the electric utility's costs (as Champlain Valley has experienced since the passage of the 1996 Act). The electric utility adamantly resists any reduction in this percentage, despite the 7.4% reduction or offset of its own percentage it has enjoyed since the advent of cable television (CATV) in 1978, and despite the anticipated further offset it will enjoy from contributions by new telecommunications carriers pursuant to the 1996 Act.

Consider the resulting anomaly on a joint use pole with four users: a small cable-only provider (CATV) with a space allocation of 1 ft, a large new competitive access provider (CAP) also with 1 ft, a small ILEC with 2 ft, and a large electric utility with 8 ft of attachment space and 40 additional inches of separation space. In this situation the CATV will pay some 7% of the electric utility's costs pursuant to the retained usable space formula, the new CAP some undetermined percentage pursuant to the formula in the 1996 Act (depending on the rules adopted by the Commission--let us assume 13%), the small ILEC 45% pursuant to an obsolete contract, and the electric utility, after contributions from the pole's other users, some 35%. It is inconceivable that a small ILEC, which in this foursome is most like the small CATV, can compete in a local telecommunications market under these conditions.

4. Special rules required for small ILECs

A small ILEC simply cannot afford to pay 45% of an electric company's costs pursuant to obsolete joint use cost allocations, especially when the electric utility is receiving a reduction in its own obsolete allocation of 55% by the percentages paid by CATVs and CAPs. We urge the Commission to recognize that small ILECs cannot maintain a competitive position by negotiation in situations such as we have just described, and to extend its jurisdiction to a consideration of such disputes.

In their comments, American Electric *et al.* seek to remind the Commission that its authority under § 224(e) is not plenary, and contend that the Commission has very limited authority pursuant to the provisions of this subsection.[4] They appear to assume that the Commission's authority does not extend to attachments by ILECs, and in fact suggest that ILECs should not even be counted as an attaching entity for purposes of the new formula contained in § 224(e) of the 1996 Act.[5] We disagree.

The Commission's jurisdiction over pole attachments is contained in § 224(b), and is stated thus: "Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for *pole attachments* to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions (emphasis added)." In the 1996 Act Congress redefined the term "pole attachment" in § 224(a)(4) to include "any attachment by a ... *provider of telecommunications service* to a pole, duct, conduit,

or right-of-way owned or controlled by a utility (emphasis added)." Interestingly, Congress then added a new definition in the immediately succeeding subsection, § 224(a)(5), to exclude ILECs from the definition of "telecommunications carrier" for purposes of Section 224 only. Congress did not modify the language of § 224(b), leaving the Commission's jurisdiction over "pole attachments" unchanged.

American Electric *et al.* would have the Commission believe that the exclusion in § 224(a)(5) of ILECs from the term "telecommunications carrier" for purposes of Section 224 operates to nullify the Commission's jurisdiction over attachments by ILECs. We submit that this is not the case. The term "telecommunications carrier" as defined in Section 3 of the Act "means any provider of telecommunications services." In light of this definition, § 224 (a)(4) and § 224 (b) must be read in conjunction to confer jurisdiction on the Commission over pole attachments of telecommunications carriers generally, including ILECs. However, American Electric *et al.*'s reading of these provisions apparently leads them to assume that both provisions have been modified to incorporate the exclusionary definition of telecommunications carriers contained in § 224(a)(5), rather than the more encompassing "provider of telecommunications service." In fact, Congress invoked the exclusionary term in neither provision; we must believe this was not inadvertent. American Electric *et al.* cannot import a definition into these provisions that they do not contain.

The exclusion in § 224(a)(5) is subject to its own caveat, that it applies only for purposes of Section 224. Because the term "telecommunications carrier" has a more

global meaning elsewhere in the Act, the exclusion can only validly operate in respect of those provisions of Section 224 which explicitly invoke the term. The provisions conferring jurisdiction, which are § 224(b) and § 224(a)(4) read together, contain no reference to "telecommunications carrier." In light of the specific exclusion that immediately follows, this cannot be accidental. The ILEC exclusion as encapsulated in the use of the term "telecommunications carrier" elsewhere in Section 224 cannot be interpolated into the jurisdiction clauses. American Electric *et al.* cannot dispute that an ILEC is clearly "a provider of telecommunications service." The Commission may--indeed, must--regulate the rates, terms and conditions for pole attachments by incumbent local exchange carriers to provide that they be just and reasonable .

We urge the Commission to take explicit notice of the fact that while Section 224 contains two formulas mandated for use in two specific regards--that is, for cable television (only) providers and telecommunications carriers other than ILECs--there is nothing in the provisions of Section 224 that prohibit the Commission from invoking either of these formulas on behalf of other providers of telecommunications service over which the Commission has jurisdiction. This should include ILECs. The Commission's jurisdiction under § 224 (b) permits it to apply these (or any other) formulas to ILECs where their application would achieve the directive of Section 224--the provision of just and reasonable rates.

The true effect of § 224 (e) is to exclude ILECs from <u>mandated</u> application of the formula contained in the subsection. We agree generally with the proposition

that arms-length negotiation of joint use agreements is a laudable objective, but a very pertinent issue is whether or not the parties enjoy equal bargaining positions. Large ILECs such as the RBOCs may enjoy equality of bargaining status with large local electric utilities. They own a formidable percentage of the joint use poles, and they are poised to become lessors of pole space to new carriers. Small ILECs are much more like small local CATV companies than they are remotely like RBOCs. They fall classically within the ambit of the class of small telecommunications competitors Section 224 was designed to protect.

We ask the Commission to recognize this distinction, and to define conditions where it will exercise its power to review the contractual arrangements of ILECs. Appropriate conditions for triggering such review might include one or more of the following:

(1) Characterization as a rural telephone company as defined by 47 USC § 153 (37).

(2) Market entry within the five years prior to the passage of the 1996 Act.

(3) No or negligible pole ownership.

(4) Any other condition the Commission deems appropriate.

We are not asking the Commission to void valid agreements. Joint use contract provisions such as those establishing a 45%/55%, two-party, cost distribution ratio are already effectively voided, in light of the reduction of the electric utility's allocated percentage by third and fourth pole users, unless the electric utility is collecting in excess of 100% of its annual pole-related expenses. We do ask that the Commission not overlook, in its consideration of this NPRM, the

hugely negative position of new entrants in the communications marketplace who are in every regard the type of new competitor the Telecommunications Act of 1996 intended to protect and promote, but who happened to be an incumbent local exchange carrier on the date of passage of the Act.

CHARACTERISTICS OF A JOINT USE POLE

In its Second Report and Order governing pole attachments, issued in 1979, the Commission determined that the most commonly used [joint use] poles are 35- and 40-foot poles.[6] This resulted in adoption of a height of 37.5 ft for the standard joint use pole. Allowing 18 ft ground clearance to the first attachment, and 6 ft for in-ground placement, the Commission found that 11 ft of usable space was available on a 35-foot pole, and 16 ft on a 40-foot pole, for an average amount of usable space of 13.5 ft on the standard pole.[7] The Commission included the 3 ft 4 in of safety separation mandated by the National Electrical Safety Code (NESC) in the usable space, observing that this space is used for the placement of street light brackets, etc.[8] This NPRM seeks to define the standard joint use pole and its associated space allocations for purposes of implementing the 1996 Act.

1. Safety separation space

In its NPRM the Commission has tentatively concluded that the safety

separation space on a joint use pole should be allocated to the electric utility as usable space, since it emanates from the electric utility's requirement to comply with the NESC. EEI and UTC propose instead that the safety separation be assigned to the usable space of cable and telecommunications companies, or failing this (which they obviously recognize as a losing proposition), be considered non-usable space and its cost shared by all the attaching entities on the pole. We disagree.

The safety separation space required between electrified facilities and communications cable on a jointly used pole is often incorrectly called the "neutral" space. "Neutral" suggests that this space has a neutral function--no specific role as regards one or the other of the pole's users. From this alleged neutrality stems the argument that all pole users should share its cost. This is a mischaracterization. The mandated safety separation space, as this space is more correctly called, is a safety zone that is needed to protect other pole users because electric facilities are dangerous. It is not neutral space at all.

EEI and UTC make the argument that:

> ... the safety space emanates from the need to protect communications workers from electric lines. It would not exist but for the presence of communications cables and their workers on utility poles. If one looks at electric utility poles on which there are no attaching entities there is no 40-inch separation space.[9]

This argument is equally true of communications companies. Actually, if one looks at telephone utility poles on which there is no attaching <u>electric</u> entity, there is no 40-inch separation space. In fact, there can be half a dozen communications

companies occupying a pole, and there would be no requirement for a safety zone. But add one electric carrier, and suddenly a safety zone must be added to the required pole space. It is the electric utility's presence that triggers the requirement.

The issue then becomes--which pole user or users should absorb the costs associated with safety space that has to be added when, and only when, an electric company attaches to a joint use pole? It would seem inherently unreasonable to ask any of the six communications companies (each of which came onto the pole without creating the need for a safety separation zone) to help defray its cost. The safety separation is clearly attributable directly to the electric utility and the nature of its enterprise. It is a direct consequence of the inherently dangerous nature of that enterprise, and has no other *raison d'être.* Its cost should therefore be absorbed by the electric utility on the pole.

Furthermore, as the Commission itself observed in its second Report and Order, and as EEI and UTC concede, this space is actually utilized by the electric company for the placement of streetlight brackets and other electrical appurtenances. The Commission observed in its Order at page 71:

> ... we note the common practice of electric utility companies to make resourceful use of this safety space by mounting street light support brackets, step-down distribution transformers, and grounded, shielded power conductors therein. While this practice may be more prevalent in urban areas and may vary from company to company, the 40 inches does appear to be of practical benefit to the electric utility.[10]

EEI and UTC make the lame countering argument that the safety separation is not available for the placement of horizontal spans of wire, as though horizontal spans

of wire were the only true attachments.[11] This is patently not the case--EEI and UTC would surely not argue that a transformer is not an attachment. EEI and UTC fail to define the "creative use" they claim telecommunications companies frequently make of the space below the communications space.[12]

What we do believe is undeniable is that joint use is here to stay. Even if it were economically feasible, telecommunications companies would not be permitted to build a separate, electricity-free pole line. Municipalities would simply not permit it. Given that these parties are all required to co-exist on the same poles, the electric industry should be required to assume responsibility for the nature and consequences of its activities. The law typically imposes strict liability for the transportation of hazardous materials on the nation's highways. The transport of electricity on utility poles is directly analogous, and the Commission should not permit the electric industry to avoid its responsibilities by shunting any related cost, such as the cost of the electrically-mandated safety separation on a pole, onto other pole users.

2. Height of the standard pole and associated space allocations

The electric utilities have apparently filed a Whitepaper in which they recommend that the height of a standard pole be increased to 40 feet, while simultaneously recommending that the usable space be decreased to 11 feet.[13] Both of these recommendations have serious flaws.

Because their intent was to establish rates for CATV companies, the Commission's early orders considered only the 1 ft of usable space allocated to CATV. However, it is pertinent to point out here that of the remaining 10 ft of usable space on a 35-foot pole, and 15 ft on a 40-foot pole, only 2 ft is typically allocated on either height of pole to the telephone company. The third pole user, the electric utility, receives the benefit of the remaining 8 ft of usable space on a 35-foot pole (8 times the CATV space, 4 times the telephone space), and 13 ft on a 40-foot pole (13 times the CATV space, 6-1/2 times the telephone space). In the increase to a 40-foot pole, the electric user is the exclusive beneficiary of the additional 5 ft of usable space.

Add a new telecommunications carrier to the pole pursuant to the new Act, and the disparities change very little. To preserve 12 inches of separation between different communications facilities, the new carrier will require 1 foot of space, akin to the CATV. This would reduce the electric company's usable space allocation to 7 ft on a 35-foot pole, and 12 ft on a 40-foot pole, a negligible reduction.

The original 1978 usable space formula compensated for the differential appropriation by the electric user of a pole's usable space by allocating its non-usable space in the same proportion as its usable space was allocated. The formula for telecommunications carriers in the 1996 Act introduces the concept of equal sharing of non-usable pole space, albeit with a one-third reduction which is presumably absorbed by the pole owner. This is very different from the premise of the original usable space formula, which is that the parties derive benefit from the common

space in the same ratio as their use of the usable space.

The new formula appears to begin from the premise that the parties on a joint use pole derive equal benefit from its supporting common space. We agree with Bell Atlantic that the language of § 224(e)(2) calls for "equal apportionment of [non-usable space] costs among all attaching entities" in applying the new formula, including the electric utility on the pole.[14] Therefore, under the new formula, the same allocations of the non-usable space would apply whatever the pole height, and whatever the distribution of the usable space on the pole. Differential allocations of usable space are made irrelevant by the new formula.

However, differential allocations of usable space exist and cannot be ignored. The higher the pole, the greater the cost of buying and setting it. Forty-foot poles cost more to buy and set than 35-foot poles. Therefore 24 ft of common space on a 40-foot pole costs more than 24 ft of common space on a 35-foot pole. It is extremely relevant that the entire benefit of the usable space differential between a 35- and a 40-foot pole goes to one pole user--the electric utility. As between a 35-foot and a 40-foot pole, the space allocation of every other user stays the same; only the electric company's allocation changes.

Precisely because the new formula calls for payment of the same proportion of non-usable space costs whatever the pole height, the Commission cannot include in the mix of applicable joint use poles any height of pole required solely for one user. If pole users under the provisions of the new Act must pay the same proportion of the non-usable space on any joint use pole, then the effect of inclusion

of 40-foot poles in the mix is that the electric utility receives 5 additional feet of usable space with no change in its non-usable space allocation, that is, for free. To ask another pole user, which receives no portion of the incremental usable space afforded by the increase to a 40-foot pole, to help defray the increase in cost of its common space, is to establish a subsidy in favor of the electric companies at the expense of all other pole users.

On the face of it, then, the formula of the new Act fails to compensate for differential allocation of usable space to one preferred party. This is inequitable, and the Commission should insure that its implementation forestalls this effect. The solution is for the Commission to amend its current designation of a 37.5-foot pole as the standard joint use pole, and to adopt a 35-foot pole as standard. The 35-foot pole is the pole of original joint use, standard before electric utilities doubled the space required for their attachments. The 37.5-foot pole blended pole is created only by including 40-foot poles in the mix, and 40-foot poles are required solely to provide electric utilities with excess usable space. Although the usable space on a 35-foot pole is still disproportionately allocated to the electric company, and other pole users would still not derive equal benefit from the common space, it is the maximum size of pole which should form the basis for application of the new formula.

We recommend that the standard pole should be a 35-foot pole with the following presumptive space allocations (it is accepted engineering practice to set a 35-foot pole at a depth of 5.5 ft):

In ground placement:	**5.5 ft**	**(non-usable)**
Ground clearance:	**20.0 ft**	**(non-usable)**
Safety Separation:	**3.3 ft (40 in)**	**(usable--electric)**
Electric company:	**2.2 ft**	**(usable)**
Telephone company:	**2.0 ft**	**(usable)**
CATV company:	**1.0 ft**	**(usable)**
New communications carrier:	**1.0 ft**	**(usable)**
TOTAL	**35.0 ft**	

This subdivides the 35-foot standard joint use pole into 25.5 ft of non-usable space and 9.5 ft of usable space.

There is logical symmetry to this subdivision of a joint pole. Apart from the safety separation, the traditional pole owning utilities (the local electric and the telephone companies) utilize two thirds of the usable space, a third more than the combined allocation to the CATV and new carrier. It is therefore equitable that the pole owner should absorb a third of the cost of the non-usable space. The electric utility is assessed the separation space as part of its usable space, but its presumptive share of the non-usable space is based on its allocated attachment space.

Note that this distribution of a joint pole changes the space allocation for ground clearance to 20 ft from 18 ft. Adelphia Communications Corp. *et al.* point out that the NESC has reduced the mid-span ground clearance requirement from 18 ft to 15.5 ft over road crossings.[15] However, the higher standard remains the norm in the field, and to achieve mid-span clearance of 18 ft, allowing for sag, the actual point of attachment on a pole must be at least 20 ft. Reduction of the clearance would also leave no room for new users to come onto a pole.

3. Excess space usage

Any utility, such as the electric company, that requires usable space in excess of its allocation under this presumptive pole distribution should be required to bear the cost of going to the next height of pole to obtain the additional required footage. The Commission definitely should not acquiesce to the electric industry's request to adopt a 40-foot pole as standard across the board. To do so would be to require new communications carriers--indeed, all other pole users--to underwrite the electric industry's ever increasing space needs.

COMPONENTS OF THE RATE FORMULAS

1. Average embedded pole cost

The choice of standard pole directs the mix of poles from which a pole-owning utility's average historical embedded pole cost is calculated. To the extent that the original FCC usable space formula continues to apply, to CATV companies and to any small incumbent LEC to which the Commission extends its application, we recommend retention of the traditional components of the usable space formula, with one amendment: increase of the required ground clearance.

Where the new formula of the 1996 Act applies, with its requirement that all attaching entities be considered equally in allocating the cost of a pole's non-usable space, 40-foot poles must be withdrawn from consideration. With 40-foot poles

removed from the equation, the 35-foot pole becomes the standard pole from which the pole owner should calculate its historical average cost. There is then no reason to attempt the distinction between electric and telephone poles recommended in the comments of the National Cable Television Association. NCTA rightly recognizes the obvious problem of overuse of usable space by the electric utilities, and suggests that all electric poles be considered to be 40-foot poles.[16] We agree with NCTA in principle, but recommend instead that:

(1) **All joint use poles should be deemed to be 35-foot poles.**

(2) **The historical average embedded cost of a pole for purposes of the formula should be the historical average cost of 35-foot poles only.**

(3) **The electric utility should absorb all costs associated with the excess 5 ft at the top of a 40-foot pole reserved for its exclusive use.**

This resolves another anomaly: the traditional collection by the electric utilities of far higher joint use pole attachment rates than is chargeable by telephone companies, for what is essentially the same benefit. AT&T Corporation made specific reference in its comments to the fact that the electric utilities distribution investment is over $22 billion dollars compared with $5 billion for incumbent pole-owning LECs.[17] There are probably various reasons for this, but one is bound to be that electric companies set taller poles to meet their excessive space requirements. The Commission cannot permit or endorse subsidization by the communications industry of greater pole costs for higher poles necessitated solely because of the excessive space needs of the electric industry.

2. Contributions to utility pole line accounts

There is another possible reason for the high electric industry pole costs pinpointed by AT&T.[18] As the majority pole owner across the country, electric utilities set poles, not just for themselves, but for telephone companies and cable companies as well. As a consequence of the new Act they will now also be setting poles for new communications carriers. The electric utilities are reimbursed under the terms of their joint use contracts for the capital costs they incur to set poles on behalf of other pole users, but there is no evidence that these contributions to their capital costs received from other pole occupants are credited to the electric utilities' pole line accounts.

If in fact the historical pole account of an electric company includes costs it did not incur, costs that have been reimbursed by other parties, then both those accounts and the company's historical average pole cost for purposes of application of the rate formulas are and will continue to be inflated. Furthermore, since the contributing telephone and other companies treat payments to the electric utility for capital improvements to its plant as capital expenditures of their own, the result is that for any given joint use pole the public may end up paying for recovery of much more than 100% of its cost. It is imperative that the Commission investigate this issue.

Whatever has happened in the past, for the future the Commission needs to insure that electric companies remove all reimbursements for capital pole expenditures from their pole line accounts. The Commission needs to identify the electric industry account that receives these payments, and establish a mechanism

for offsetting and reducing the gross pole line account by an amount equal to these reimbursements.

3. The problem of duplicated rate assessment

The Commission is charged, in the absence of effective state regulation, with ensuring that the rates charged for pole attachments are just and reasonable. As applied to pole attachment rates, "just and reasonable" was defined in 1978 in 47 USC § 224(b)(1) of the Communications Act, and this definition remains unchanged in the 1996 Act.

As restated in the Commission's NPRM of August 12, a just and reasonable rate is defined in § 224(d)(1) as a rate ranging from the statutory minimum (incremental costs) to the statutory maximum (fully allocated costs). The NPRM notes that "incremental costs" include "pre-construction survey, engineering, make-ready and change-out costs," while "fully allocated costs" is "the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that is equal to the portion of usable space occupied by an attacher."

Since § 224(d)(1) presents incremental costs as the minimum rate, and fully allocated costs as the maximum rate, in a range of possible rates, it is clear that the intent of the section is that a pole user should pay a rate that falls somewhere along this continuum. However, it is common practice for pole-owning utilities to charge, not a single rate that falls along this continuum, but a combination consisting of the sum of both ends of the spectrum.

That is, an attacher is routinely billed up-front for all pre-construction survey, engineering, make-ready and change-out costs, and then, in addition, is billed annually for its percentage of fully allocated costs on every pole to which it is attached. Those poles for which the attachee has already been billed and has paid the full incremental cost of make-ready, are entered again into the equation for purposes of determining the total number of poles for which fully allocated costs are assessed annually.

On the face of it, this is duplicated billing under the Act. It is standard practice for a pole-owning utility to bill in advance, under the terms of its pole lease agreement, for all incremental costs it incurs for every pole it changes out at the request of a cable television company or a small local telephone company. It has therefore incurred no capital investment on behalf of that lessee *vis à vis* those poles. If it has incurred no capital investment, it would appear to have no costs to"recover" pursuant to the maximum range of the formula. And this seems to be the intent of the Act--that either incremental costs or fully allocated costs are recoverable, but not both.

We ask the Commission to recognize this further potential for overstatement of utility pole costs, and to include in the rate formula a mechanism for backing out poles that have already been paid for up-front by an attachee from the pole count for which annual rental is due.

CONCLUSION

Champlain Valley Telecom, Inc., Waitsfield Telecom, Inc., and Waitsfield Cable Television, Inc., respectfully ask the Commission, in its disposition of this Notice of Proposed Rulemaking, to consider and implement the recommendations contained in the foregoing reply comments.

Respectfully submitted,

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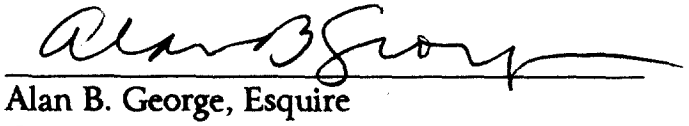

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